Public Prosecutor v Sulaiman bin Ahmad

HIGH COURT (TAIPING) — CRIMINAL APPEAL NO 51-13-92 (1987)
ABDUL MALIK ISHAK JC
20 OCTOBER 1992

Criminal Procedure *— Sentence — Adequacy of sentence — Factors to be taken into account by the court when sentencing accused*

Criminal Procedure *— Sentence — Interference of by an appellate court — Circumstances in which court may do so*

Criminal Procedure *— Sentence — Order of police supervision — Circumstances in which an order would be made — Criminal Procedure Code (FMS Cap 6) ss 295, 296 & 297*

The respondent pleaded guilty to a charge of possession of 0.83g of heroin. He had five previous convictions for similar offences. He was sentenced to two years' imprisonment to be followed by one year police supervision. The prosecution appealed.

Held, dismissing the appeal:

(1) When deciding what sentence to impose, the court must have regard to the public interest, the plea entered, the age of the offender, his health, his character and background, the nature of the offence and the circumstances and the manner in which the offence was committed.

(2) An appellate court will not interfere with the sentence imposed unless it can be shown that in the circumstances, the sentence was manifestly excessive or inadequate or that in fixing the sentence, the subordinate court had failed to adequately consider all relevant factors for or against the offender.

(3) A plea of guilty was a mitigating factor even if the offender was shown to be a hardened criminal.

(4) Supervision orders should be sparingly used and should be restricted to the most appropriate or suitable cases. In the instant case, the respondent's previous drug convictions merited an imposition of the supervision order. The order also served to curtail the respondent's tendency to promote himself to a more serious crime.

(5) There was nothing on the record to show that the learned magistrate had erred in sentencing the respondent. Everything relevant had been considered. The sentence was according to law and was not manifestly inadequate.

[Bahasa Malaysia summary

Penentang telah mengaku bersalah terhadap tuduhan memiliki 0.83g ganja. Beliau mempunyai lima sabitan terdahulu untuk kesalahan

A yang sama. Beliau telah dihukum dua tahun penjara dan selepas itu satu tahun dibawah pengawasan polis. Pihak pendakwa telah membuat rayuan.

Diputuskan, menolak rayuan itu:

B (1) Apabila membuat keputusan mengenai hukuman yang perlu dikenakan, mahkamah mesti mengambil berat tentang kepentingan awam, akuan yang dibuat, umur si tertuduh, kesihatan, kelakuan dan latarbelakangnya, sifat kesalahan dan keadaan dan cara kesalahan dilakukan.

(2) Suatu mahkamah rayuan tidak akan melibatkan diri dengan C hukuman yang dikenakan kecuali jika boleh ditunjukkan bahawa dalam keadaan itu, hukuman itu adalah terlalu berat atau terlalu ringan atau apabila menentukan hukuman itu, mahkamah rendah telah gagal mempertimbangkan dengan memadai kesemua faktor yang relevan menyokong atau menentang si tertuduh.

(3) Suatu akuan bersalah adalah suatu faktor peringanan walaupun si D tertuduh ditunjukkan sebagai seorang penjenayah yang tidak berhati perut.

(4) Perintah pengawasan sepatutnya digunakan dengan hemat dan sepatutnya dihadkan kepada kes yang wajar dan sesuai. Di dalam kes ini, sabitan terdahulu penentang yang berkaitan dengan dadah E mewajarkan suatu perintah pengawasan dikenakan. Perintah itu juga bertindak menghadkan kecenderungan penentang melibatkan diri dalam kesalahan yang lebih serius.

(5) Tidak terdapat bukti yang menunjukkan bahawa majistret yang arif telah salah apabila menghukum penentang. Segala-gala yang berkaitan telah dipertimbangkan. Hukuman itu berdasarkan F undang-undang dan tidaklah terlalu ringan.]

Cases referred to

1 *Kenneth John Ball* (1951) 35 Cr App R 164 (follD)
2 *PP v Teh Ah Cheng* [1976] 2 MLJ 186 (refd)
G 3 *Liow Chow & Anor v PP* [1939] MLJ 170 (refd)
4 *PP v Fam Kim Hock* [1957] MLJ 20 (refd)
5 *Sau Soo Kim v PP* [1975] 2 MLJ 134 (refd)
6 *Melvani v PP* [1971] 1 MLJ 137 (refd)
7 *R v James Henry Sergeant* (1974) 60 Cr App R 74 (refd)
H 8 *PP v Zaini* (1964) 30 MLJ 221 (distd)
9 *PP v Jafa bin Daud* [1981] 1 MLJ 315 (not follD)
10 *Abdul Wahab v PP* [1970] 2 MLJ 203 (refd)
11 *PP v Haled* [1981] 2 MLJ 211 (refd)
12 *Zakariya bin Musa v PP* [1985] 2 MLJ 221 (refd)
13 *Roslan bin Haji Yahya v PP* [1985] 2 MLJ 218 (refd)
I 14 *Re Bakar bin Ahmad* [1959] MLJ 256 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 295, 296, 297

Murtazadi Ahmad (Deputy Public Prosecutor) for the appellant. A
Sulaiman bin Ahmad (respondent) in person.

Abdul Malik Ishak JC: This is an appeal by the public prosecutor against the sentence passed by the learned magistrate, Magistrate's Court, Selama, Perak, on the respondent who was charged as follows:

B

> Bahawa kamu pada 25 September 1986 jam lebih kurang 9.15 pagi di rumah no 31, Peringkat 1 Felda Ijok Redang Panjang Selama, dalam daerah Selama, dalam Negeri Perak, telah didapati memiliki 0.83g dadah berbahaya iaitu heroin dan oleh yang demikian itu kamu telah melakukan suatu kesalahan di bawah s 12(2) dan boleh dihukum di bawah s 12(3) Akta Dadah Berbahaya 1952.

C

The respondent pleaded guilty to the charge and was duly convicted and sentenced to two years' imprisonment to be followed by one year of police supervision.

The facts adduced by the prosecution and admitted by the respondent are briefly that at about 9.15am on 25 September 1986, a party of police officers headed by Insp Abu Bakar raided house no 31 Peringkat 1, Felda D
Ijok, Redang Panjang, Selama and arrested the respondent who was, at the material time, alone and seated on the floor of his bedroom filling powder, suspected to be drugs, into a plastic straw. The police seized the plastic straw together with three other plastic straws also filled with powder suspected to be drugs. The contents of the plastic straws were analyzed by the government chemist and confirmed to contain 0.83g of heroin. In the same E
room the police also confiscated:

(a) a rolled one dollar note;
(b) a cigarette box containing nine empty plastic straws;
(c) nine empty plastic straws;
(d) two small knives; F
(e) one small candle;
(f) one plastic packet containing 14 empty plastic straws;
(g) one green coloured plastic pail;
(h) one box of 'Gold Flake' cigarettes;
(i) two pieces of silver coloured foils; G
(j) a wallet containing RM15; and
(k) a bag of clothings.

In short, the respondent who was alone in the said house was caught red-handed with the dangerous drugs.

The learned deputy public prosecutor contended that the sentence was H
grossly and manifestly inadequate bearing in mind that the respondent had five previous convictions, all of which were for possession of dangerous drugs. It was also contended that the learned magistrate failed to adequately consider the public interest. It was further contended that the learned magistrate failed to appreciate the gravity of the offence and was unduly I
influenced by the respondent's plea of guilty. Lastly, the learned deputy contended, with great vigour, that the learned magistrate had failed to take into account the facts of the case.

I must lay stress that the burden of proving an offence is on the prosecution, the duty to determine an appropriate sentence is on the court.

A Both the prosecution and the defence may assist the court by forwarding submissions pertaining to sentence, but the final decision and the sentence to be imposed is within the court's sole jurisdiction.

The definition of 'sentence' is found in the *Concise Oxford Dictionary*. It is defined as punishment alloted to persons condemned in a criminal trial. Sentencing can be said to be the act of imposing punishment in such a B criminal trial.

There is no simple mathematical formula for sentencing. A variety of factors must be taken into account according to the circumstances of each individual case. A delightful analysis of the classic principles of sentencing and general aspects of punishment is set out in *9 Halsbury's Laws of England* C (Hailsham Ed) para 365:

> The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the D prisoner up to the time of sentence, his age and character.

Yet another classic is the oft-quoted case of *Kenneth John Ball*.[1] There, the appellant aged 23 years had a bad record. His friend (the co-accused), aged 29 years also had a bad record. Both were accused of three offences of burglary but because there were exceptional matters affecting the character E of the co-accused, he was placed on probation for three years; the appellant was sentenced to five years' imprisonment. On appeal, the Court of Criminal Appeal decided not to interfere with the sentence of the appellant. Hilbery J had this to say:

> In deciding the appropriate sentence a court should always be guided by certain F considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also G deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to H each criminal, the court has the right and the duty to decide whether to be lenient or severe.

The learned judge in *Ball*'s case[1] cannot be said to lay down any rules on public interest but rather was merely making an observation on what public interest would be in relation to the 29-year-old offender who had exceptional I antecedents and character. I am of the considered view that the public interest varies according to the time, place and circumstances of each case including its nature and prevalence. Therefore, what is deemed to be of public interest in one place may not be so in another. In short, the concept of public interest is very fluid.

The learned editors of 10 Halsbury's Laws of England (3rd Ed) at p 487 state as follows:

> The object of punishment is the prevention of crime, and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act or omission and to prevent other members of the community from committing similar crimes.
>
> As regards the particular offender there are three ways of providing by punishment against the recurrence of any offence:
>
> (1) by taking from him the power of offending (incapacitation);
> (2) by taking away the desire of offending (reformation);
> (3) by making him afraid of offending (intimidation).

In respect of offences under the Dangerous Drugs Act 1952 ('the Act'), a gradual change in the attitude of the legislature in the last few years can be discerned. The Act has been amended a number of times. For example, the penalty for the offence of possession of any dangerous drugs under s 12(2) of the Act was increased from a maximum of RM10,000 fine to a maximum of RM20,000 fine and the maximum imprisonment was increased from three years to five years (see Act A194/73 wef June 1973). In my considered view, the courts will not be performing their functions judiciously if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. The imprisonment imposed would not only have some effect on the offender but also serve as a deterrent. This in turn would provide an opportunity, indeed a rare opportunity, to the prisons department of trying to remedy such defect of character as there may be. Or as Eusoffee Abdoolcader J (as he then was) succinctly said in the case of *PP v Teh Ah Cheng*:[2]

> ... the creaking of the prison doors closing shut behind him will afford the respondent ample opportunity to ponder on his folly in the company he keeps, and give others of his ilk and equally gullible, cause to reflect on the desirability of the company they should or rather should not keep ...

I am mindful of the case of *Liow Chow & Anor v PP*[3] where it was held that:

> The sentence of the court of first instance should not be altered unless the appellate court considers the sentence unjust. An appellate court must reject 'the lore of nicely calculated less or more' in matters of sentence. Before the sentence is altered it must be manifestly wrong, wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

In the same vein, Buhagiar J in the case of *PP v Fam Kim Hock*[4] said:

> It is an established principle that the sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances.

On the question of sentence, the courts invariable take certain factors into consideration — the first and foremost being the public interest. Then the age of the offender, his health, his character and background, the nature of the offence and the circumstances and the manner in which the offence is committed. The courts are duty bound to consider all these matters before deciding upon a suitable sentence or a sentence according to law. Thus, on

A an appeal on sentence from the subordinate courts, the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case, the sentence was manifestly excessive or inadequate or that in fixing the sentence, the subordinate courts had failed to adequately consider all relevant factors either for or against the offender.

B In the instant appeal, the learned magistrate took into account the following factors before passing sentence, viz:

(1) the facts of the case, the mitigation plea and the previous conviction record of the respondent;

C (2) the plea of guilty by the respondent and the consequential saving of time and money (see *Sau Soo Kim v PP*[5] where Lee Hun Hoe CJ (Borneo) stressed that by pleading guilty it 'not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witness.';

(3) the plea of guilty as a mitigating factor. This is often accepted by the D courts — see *Melvani v PP*[6] where Wee Chong Jin CJ (Singapore) said: 'In principle I consider it proper that where an accused person pleads guilty the court in assessing sentence ought to consider such a plea as a mitigating factor.')

The learned magistrate also stated that the concept of 'a tooth for a tooth, E and an eye for an eye' no longer plays a part in our criminal law. I entirely agree with him. Lawton LJ in *R v James Henry Sergeant*[7] said: 'The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law.'

The learned deputy public prosecutor contended that the respondent is a hardened criminal with a string of drug convictions (five, to be exact). F The period of imprisonment should be enhanced as the respondent appeared not to have profited from his previous sojourn in prison. *PP v Zaini*[8] was cited in support of the learned deputy's contention. I must at once say that the facts in *Zaini*'s case[8] is entirely different from the instant appeal. The respondent in *Zaini*'s case[8] was charged with giving false evidence before a G kathi when he applied to get married. The respondent stated to the kathi in a judicial proceeding that he was a bachelor when in fact he was a married man. The respondent pleaded guilty to an offence under s 193 of the Penal Code (FMS Cap 45) and was sentenced to one day's imprisonment and a fine of RM150 by the district judge. On appeal, the High Court altered the sentence to one of imprisonment for six months for the simple reason that H the respondent had a previous conviction for a similar offence where he had been treated lightly but appeared to have not profited by it.

Next, the learned deputy cited *PP v Jafa bin Daud*[9] where Mohamed Azmi J (as he then was) explained the meaning of 'sentence according to law'. His Lordship said:

I > A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles.

By citing *Jafa*'s case,[9] the learned deputy was making a comparison wherein his Lordship enhanced the sentence from eight months' imprisonment to

18 months' imprisonment for an offence under s 12(2) of the Dangerous Drugs Act 1952 (Rev 1980) and consequently, the learned deputy urged this court to do likewise. Incidentally, the respondent in *Jafa*'s case[9] had five previous convictions — two of which were connected with drugs whilst the other three involved thefts.

On the other hand, the respondent contended that he had served the sentence imposed by the learned magistrate, Magistrate's Court, Selama, Perak. He contended that the hearing of the appeal was too late in the day. The appeal should have been fixed for hearing while he was serving his term at Taiping Prisons. The respondent unabashedly admitted that he is a hardened criminal and currently undergoing imprisonment at Pulau Pinang Prisons for a drug offence. According to the respondent, he is currently serving a four year jail term imposed by the Butterworth Magistrate's Court wef 6 February 1991 and would be freed on 6 October 1993 (confirmed by the learned deputy.) However, one must not lose sight of the fact that a plea of guilty of a hardened criminal must be treated as a mitigating factor (see *Sau Soo Kim v PP*[8] where Lee Hun Hoe J (as he then was) said: 'Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor.')

There is one other matter to be considered, viz, the one year of police supervision order commencing immediately after the expiration of the two years' imprisonment. The learned deputy did not address me on it. Now there are three conditions under s 295(i) of the Criminal Procedure Code (FMS Cap 6) that must be present before the magistrate could apply the power set out thereunder. They are:

(a) the offender must have been convicted of an offence previously;
(b) that previous offence is one punishable with imprisonment for a term of two years or upwards; and
(c) the offence which the offender is presently convicted of is also one punishable with imprisonment for a term of two years or upwards.

What are the obligations of the respondent under the police supervision order? They are clearly spelt out in s 296 of the Criminal Procedure Code (FMS Cap 6). Briefly, the respondent has to notify the place of his residence to the officer in charge of the police district (OCPD) in which his residence is situated; he has to notify any change of residence to the OCPD; he has to notify the OCPD in the old and new police districts should he change his residence to a new police district; when the change is to a place outside the Federation, he has to inform the OCPD in the district which he is leaving; should he return to the Federation, he has to notify the OCPD the district he wishes to reside. In addition to the above, the respondent shall also report personally once in each month at a specified time as is prescribed by the Chief Police Officer ('CPO') of the state in which he resides — either to the CPO himself or to such other person as that officer directs.

There are three instances wherein the respondent can be said to be in breach of the supervision order. They are (see s 297 of the Criminal Procedure Code (FMS Cap 6)):

(a) when the respondent remains in any place for 48 hours without notifying the place of his residence to the OCPD in which such place is situated;

A (b) when the respondent fails to comply with the requisitions of s 296 of the Criminal Procedure Code in relation to any change of residence; or
(c) when he fails to comply with the requisitions pertaining to monthly reporting to the CPO or any other person as the CPO directs.

In *Abdul Wahab v PP*,[10] the High Court only enhanced the imprisonment B sentence from two years to ten years but it chose not to enhance the period of police supervision of one year because a Magistrate's Court can only order it for one year.

In *PP v Haled*,[11] the High Court ordered police supervision for two years because 'having regard to his previous convictions and also in order to curtail his tendency to promote himself to a more serious crime.' C

In *Zakariya bin Musa v PP*,[12] the one year police supervision period was confirmed by the appellate court for an offence of theft of a motorcar.

In *Roslan bin Haji Yahya v PP*,[13] Gunn Chit Tuan J (as he then was) set aside the police supervision order as his Lordship thought that it was not justified. His Lordship approved the dictim of Rigby J in *Re Bakar bin* D *Ahmad*:[14]

> Police supervision should not be imposed by way of as additional punishment. Its sole object and only justification, as I understand it, is to ensure that in the interests of public security the police are in a position to exercise some measure of control over the movements and activities of persons of known bad character — such as burglars, pickpockets and common thieves — who habitually and E consistently lead a life of criminal dishonesty.

Supervision orders should be sparingly used by magistrates and should be restricted to the most appropriate or suitable cases. Thus, in the instant appeal, the order of one year of police supervision commencing immediately after the expiration of the two years' imprisonment passed by the learned F magistrate is solely to curtail the respondent's tendency to promote himself to a more serious crime and in the circumstances apt and appropriate. The respondent's previous drug convictions further merit an imposition of the one-year police supervision.

There is nothing on record to show that the learned magistrate had erred G in sentencing the respondent. Everything relevant was taken into account by the learned magistrate. The sentence imposed was in the circumstances according to law. Considering the background of the respondent, it is my considered view that the sentence imposed by the learned magistrate should not be disturbed. The appeal by the public prosecutor is dismissed and the sentence of the learned magistrate is accordingly affirmed.

H

Appeal dismissed.

Reported by Mathavan Devadas

I